Asamaju Enterprises v Malayan Banking Bhd

HIGH COURT (KUCHING) — SUIT NO 50 OF 1989
RICHARD MALANJUM J
30 JUNE 1995

Tort *— Negligence — Bank credited cheques marked 'not-negotiable' but endorsed by drawer into third party's account — Whether bank was negligent in doing so*

Tort *— Conversion — Bank credited cheques marked 'not-negotiable' but endorsed by drawer into third party's account — Bank given authority to do so by partners of plaintiff — Whether bank liable for conversion*

Negotiable Instruments *— Cheques — Bank credited cheques marked 'not-negotiable' but endorsed by drawer into third party's account — Whether bank was negligent in doing so*

The plaintiff was at the material time a firm with four partners — Kueh Nai Hin ('Kueh') (30%), Jamil bin Razali (30%), Mazlan bin Ridzuan (20%) and Annuar Musaddah bin Razali (20%). The plaintiff was never a customer of the defendant and had no account with the defendant. The plaintiff's own partner or partners presented cheques to the defendant and endorsed thereon for credit into Usahasama Enterprises account with Malayan Banking Bhd. Kueh was the managing partner of the plaintiff. There were times when the plaintiff required money urgently to pay its drivers and labourers. The collection and banking of cheques of the plaintiff were mainly done by Kueh. It was Kueh who presented the nine cheques to the defendant for credit into Usahasama Enterprises' account with the defendant. All the nine cheques were crossed and marked with the words 'Not negotiable'. The words 'or bearer' were undeleted. There was evidence from the defendant that Kueh came to see one of the witnesses of the defendant with the first cheque and that Kueh explained that the cheque was for the plaintiff's immediate clearance. As such the cheque had to be credited into Usahasama Enterprises' account. The cheque was endorsed by Kueh and Jamil Razali and the plaintiff's rubber stamp mark was also affixed. Kueh explained that the plaintiff needed money immediately to pay off the lorry drivers and sub-contractors. The first issue was whether the defendant was negligent in doing what it did. The second issue was whether the plaintiff contributed to the negligence. The third issue was whether alternatively the defendant was liable for conversion for money it had received.

Held, dismissing the plaintiff's claim:

(1) Having considered the evidence in addition to the agreed and undisputed facts, this court found that on a balance of

probabilities the testimony of the defendant was more trustworthy than that of the plaintiff. There was no rebuttal to the evidence of the defendant that Kueh had explained as to why the first cheque, though payable to the plaintiff, was necessary to be credited into Usahasama Enterprises' account with the defendant. And over a year there was no query from any of the partners in the plaintiff in any of the dealings of the nine cheques. Therefore, on that piece of evidence, it could not be said that the defendant should have known that Kueh was using the cheques for his own benefit and that it should have been put into inquiry.

(2) In any event, the defendant did take sufficient precautions by considering first the explanation of Kueh and ensuring that those cheques were duly endorsed by the plaintiff through one or two of the partners. Furthermore, there was no dispute that Kueh was the managing partner of the plaintiff and thus the defendant was dealing with the proper person from the plaintiff.

(3) By virtue of s 8(3) of the Bills of Exchange Act 1949 (the 'Act'), the six cheques on which the words 'or bearer' were undeleted were bearer cheques and under s 31(2) of the Act, a bill payable to a bearer was negotiated by delivery. Therefore, such six cheques could negotiated by delivery. As such, on presentation of the six cheques in this case by the bearer, Usahasama Enterprises, the defendant had to accept them for payment.

(4) With regard to the remaining three cheques on which the words 'or bearer' were deleted, they were cheques or bills payable to order. But a cheque payable to order could be altered into a 'bearer cheque' if it was endorsed in blank, that is, a signature thereof specifying no endorsee under s 34(1) of the Act.

(5) In the present case, there was no dispute that the three cheques were endorsed by Kueh and Jamil Razali and the stamp of the plaintiff duly was affixed. These two persons were partners in the plaintiff. No endorsee was specified. Thus, being the payee of the cheques, the plaintiff had accordingly endorsed them in blank thereby converting the three cheques into 'bearer cheques' and could therefore be duly negotiated by delivery. Thus, the three cheques came under the same category as the six cheques. Accordingly, on these three cheques the defendant should not be faulted.

(6) In the present case, this court was satisfied that sufficient inquiry was done by the defendant before accepting the cheques, in particular, the first cheque. The endorsements on the subsequent cheques and the absence of any query from the plaintiff over a period of over one year supported

the conclusion that a precedent had already been established in so far as the defendant was concerned. A

(7) Section 85 of the Act was applicable. On the facts and circumstances of this case, on the balance of probabilities the defendant acted in good faith, honestly and without any negligence on its part when those cheques were accepted and credited into the account of Usahasama Enterprises. B

(8) As to the issue of conversion, if the plaintiff had given the defendant authority, the plaintiff's claim for conversion would fail. Kueh explained the need for the first cheque to be credited into Usahasama Enterprises' account. Moreover, all the cheques were endorsed by the plaintiff with its stamp mark affixed. In the absence of other arrangement between the partners, it was not necessary in a partnership that all the partners had to endorse any cheque payable to the partnership. C

(9) As the plaintiff was a partnership, there could not be authority in the form of a resolution of board of directors. Moreover, in the present case, the defendant was dealing with the managing partner of the plaintiff and another partner in the plaintiff was also present when the first cheque was presented to the defendant. Thus, it would be reasonable for the defendant to conclude that the two partners had the authority. D E

(10) As another partner was also present and he and Kueh together owned 60% of the shares, they would have duly authorized the defendant to act on the first cheque. And having accepted the first cheque it would only be logical that the defendant should give the same treatment to the subsequent cheques in the absence of any objection from the other partners in the plaintiff. Therefore, there was no doubt as to the authority of those whom the defendant dealt with and the authorization given, apparent or otherwise, that followed. Thus the plaintiff's claim for conversion should fail. F G

[Bahasa Malaysia summary

Plaintif adalah satu firma dengan empat orang pekongsi — Kueh Nai Hin ('Kueh') (30%), Jamil bin Razali (30%), Mazlan bin Ridzuan (20%) dan Annuar Musaddah bin Razali (20%). Plaintif tidak pernah menjadi pelanggan defendan dan tidak mempunyai akaun dengan defendan. Pekongsi atau pekongsi-pekongsi plaintif telah mengemukakan cek-cek kepada defendan dan mengindors padanya untuk dikredit ke dalam akaun Usahasama Enterprises dengan Malayan Banking Bhd. Kueh merupakan pekongsi urusan plaintif. Ada masanya bila plaintif memerlukan wang dengan segera untuk membayar pemandu dan pekerjanya. Pemungutan dan pembayaran masuk cek-cek plaintif kebanyakannya dilakukan oleh Kueh. Kuehlah yang mengemukakan sembilan cek tersebut kepada defendan untuk dikredit ke dalam akaun Usahasama Enterprises H I

dengan defendan. Kesemua sembilan cek itu dipalang dan ditanda dengan perkataan-perkataan 'Tidak boleh niaga'. Perkataan-perkataan 'atau pembawa' tidak dibatalkan. Terdapat keterangan dari defendan bahawa Kueh telah datang menemui salah seorang saksi defendan dengan cek yang pertama dan bahawa Kueh menerangkan bahawa cek itu adalah untuk kelulusan plaintif dengan serta-merta. Oleh itu cek itu mesti dikreditkan ke dalam akaun Usahasama Enterprises. Cek itu diindorskan oleh Kueh dan Jamil bin Razali dan tanda cap plaintif juga diletakkan. Kueh menerangkan bahawa plaintif memerlukan wang dengan segera untuk membayar pemandu-pemandu lori dan kontraktor kecil. Isu yang pertama adalah sama ada defendan cuai apabila membuat apa yang telah dibuatnya. Isu yang kedua pula adalah sama ada plaintif juga menyertai kecuaian itu. Isu yang ketiga adalah sama ada secara alternatif defendan bertanggungan untuk konversi untuk wang telah diterimanya.

Diputuskan, menolak tuntutan plaintif itu:

(1) Selepas mempertimbangkan keterangan bersama dengan fakta-fakta yang dipersetujui dan tidak dipertikaikan, atas imbangan kebarangkalian testimoni defendan adalah lebih boleh dipercayai daripada testimoni plaintif. Tidak terdapat pematahan keterangan defendan bahawa Kueh telah menerangkan mengapa cek pertama, walaupun kena dibayar kepada plaintif, terpaksa dikreditkan ke dalam akaun Usahasama Enterprises dengan defendan. Dan selama lebih daripada setahun tidak terdapat apa-apa pertanyaan dari mana-mana pekongsi plaintif tentang urusniaga dengan sembilan cek itu. Oleh itu, atas keterangan itu, tidak boleh dikatakan bahawa defendan patut tahu bahawa Kueh telah menggunakan cek-cek itu untuk faedah dirinya dan bahawa ianya patut membuat pertanyaan.

(2) Apa sekalipun, defendan ada mengambil langkah-langkah yang berpatutan dengan mempertimbangkan penerangan Kueh dan memastikan bahawa cek-cek itu diindorskan oleh plaintif menerusi seorang atau dua orang pekongsi. Lagipun, tidak dipertikaikan bahawa Kueh adalah pekongsi urusan plaintif dan oleh itu defendan telah berurusan dengan orang yang berpatutan dari plaintif.

(3) Memandangkan s 8(3) Akta Bil-Bil Pertukaran 1949 ('Akta itu'), enam cek yang padanya perkataan-perkataan 'atau pembawa' tidak dibatalkan adalah cek pembawa dan di bawah s 31(2) Akta itu, satu bil yang kena dibayar kepada seorang pembawa diniagakan melalui penghantar-serahan. Oleh itu, enam cek tersebut boleh diniagakan melalui penghantar-serahan. Maka, apabila enam cek itu dikemukakan oleh pembawa, Usahasama Enterprises, defendan terpaksa menerima cek-cek itu untuk bayaran.

(4) Berkenaan dengan tiga cek yang lain pula yang padanya perkataan-perkataan 'atau pembawa' dibatalkan, mereka adalah cek-cek atau bil-bil yang kena dibayar atas perintah. Tetapi satu cek yang kena dibayar atas perintah boleh diubah kepada satu 'cek pembawa' jika ianya diindorskan secara kosong, iaitu satu tandatangan padanya tanpa menyatakan siapakah yang membuat pengindorsan, di bawah s 34(1) Akta itu.

(5) Di dalam kes ini, tidak ada pertikaian bahawa tiga cek itu telah diindorskan oleh Kueh dan Jamil bin Razali dan cap plaintif diletakkan padanya. Kedua-dua orang ini adalah pekongsi plaintif. Tiada orang yang membuat pengindorsan dinyatakan. Oleh itu, sebagai penerima bayaran cek-cek itu, plaintif telah mengindorskan mereka secara kosong dan mengubah ketiga-tiga cek itu menjadi 'cek pembawa' yang boleh diniagakan melalui penghantar-serahan. Lantaran itu, ketiga-tiga cek itu berada dalam kategori yang sama seperti enam cek yang lain. Kesudahannya defendan tidak patut dipersalahkan atas tiga cek ini.

(6) Di dalam kes ini, mahkamah berpuas hati bahawa pertanyaan yang mencukupi telah dilakukan oleh defendan sebelum menerima cek-cek itu, terutama sekali cek yang pertama. Pengindorsan pada cek-cek yang terkemudian dan ketiadaan apa-apa pertanyaan dari plaintif selama tempoh lebih daripada setahun menyokong kesimpulan bahawa satu duluan telah didirikan setakat mana defendan berkenaan.

(7) Seksyen 85 Akta itu terpakai. Mengikut fakta dan keadaan kes ini, atas imbangan kebarangkalian defendan telah bertindak dengan suci hati, jujur dan tanpa apa-apa kecuaian pada belahnya apabila cek-cek itu diterima dan dikreditkan ke dalam akaun Usahasama Enterprises.

(8) Berkenaan dengan isu konversi pula, jika plaintif telah memberikan kuasa kepada defendan, tuntutan plaintif untuk konversi akan gagal. Kueh menerangkan kenapa cek yang pertama perlu dikreditkan ke dalam akaun Usahasama Enterprises. Lagipun, kesemua cek itu telah diindorskan oleh plaintif dengan capnya. Tanpa apa-apa susunan lain antara pekongsi-pekongsi itu, adalah tidak perlu di dalam satu perkongsian bahawa kesemua pekongsi perlu mengindorskan apa-apa cek yang kena dibayar kepada perkongsian itu.

(9) Oleh kerana plaintif adalah satu perkongsian, tidak boleh ada pemberikuasaan dalam bentuk satu resolusi lembaga pengarah. Lagipun, di dalam kes ini, defendan berurusan dengan pekongsi urusan plaintif dan seorang pekongsi yang lain juga hadir apabila cek yang pertama dikemukakan kepada defendan. Maka, adalah munasabah untuk defendan membuat kesimpulan bahawa kedua orang pekongsi itu mempunyai kuasa.

(10) Oleh kerana seorang pekongsi yang lain juga hadir dan beliau serta Kueh bersama memiliki 60% perkongsian itu, mereka telah memberi kuasa kepada defendan untuk bertindak atas cek yang pertama itu. Dan selepas menerima cek yang pertama itu, ianya cuma lojikal bahawa defendan harus memberikan layanan yang sama kepada cek-cek yang terkemudian tanpa sebarang bantahan dari pekongsi-pekongsi plaintif yang lain. Oleh itu, tidak ada keraguan tentang kuasa orang-orang yang berurusniaga dengan defendan dan pemberikuasaan, ketara atau sebaliknya, yang datang daripadanya. Oleh itu tuntutan plaintif untuk konversi patut gagal.]

Notes

For cases on cheques, see 10 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 696–739.

For cases on banks' liability for conversion, see 12 *Mallal's Digest* (4th Ed) paras 29–31.

For cases on banks' liability in negligence to customer, see 12 *Mallal's Digest* (4th Ed) paras 260–264.

Cases referred to

Algemene Bank Nederland NV v Happy Valley Restaurant Pte Ltd [1991] 2 MLJ 289 (refd)

Woodland Development Sdn Bhd v Chartered Bank [1986] MLJ 84 (distd)

Legislation referred to

Bills of Exchange Act 1949 ss 2, 7(1), 8(3), 31(2), 34(1), 76, 81, 82, 85

Partnership Act 1961 ss 13, 14

Yap Yau Sin (*Wan Junaidi & Co Advocates*) for the plaintiff.

Perpetua Phang (*Reddi & Co*) for the defendant.

Cur Adv Vult

Richard Malanjum J: INTRODUCTION

In this action the plaintiff is claiming against the defendant for the repayment of the sum of RM149,617.16, interest thereon at 8% pa from the date of judgment to date of actual payment and costs. And the basis, in summary, is that the plaintiff is alleging the defendant of negligence. But as further or in the alternatives, conversion and money had and received were also pleaded.

The defendant denies the claim and the allegations of negligence, conversion or money had and received. Sections 81, 82 and 85 of the Bills of Exchange Act 1949 (the Act) were also relied upon as defences to the claim. Further, it was also averred by the defendant in its defence that the loss should be borne by the partners of the plaintiff owing to

ss 13 and 14 of the Partnership Act 1961 ('the Partnership Act'). Finally, it was also pleaded that the loss of the plaintiff was caused or contributed by the negligence of the plaintiff itself.

THE AGREED FACTS

At the commencement of the hearing of this case the parties submitted a statement of agreed facts (marked 'A'). For convenience it is reproduced verbatim as follows:

1 That the plaintiff was at material times a firm registered under the Business Names Ordinance and having its place of business at Lot 73, Tabuan Jaya, Kuching.

2 That the partners of Asamaju Enterprises at all material times were Kueh Nai Hin (30%), Jamil bin Razali (30%), Mazlan bin Ridzuan (20%) and Annuar Musaddah bin Razali (20%).

3 That Asamaju Enterprises was never a customer of the defendant and had no account with the defendant at all material times.

4 That the plaintiff's own partner or partners presented the cheques listed below to the defendant and enclosed thereon for credit into Usahasama Enterprises' account with Malayan Banking Bhd.'

Particulars

Cheque Nos	Date issued	Date collected	Amount
201443	6/9/85	27/9/85	RM11,122.10
201448	2/10/85	2/10/85	RM25,453.36
203370	24/1/86	27/1/86	RM1,777.13
204418	15/3/86	15/3/86	RM7,623.04
327745	16/9/86	17/9/86	RM28,933.38
328463	27/9/86	27/9/86	RM7,618.50
328951	27/10/86	30/9/86	RM8,723.15
330253	26/12/86	27/12/86	RM30,009.35
330254	26/12/86	27/12/86	RM28,357.15
Total			RM149,617.16

5 That the said cheques were duly endorsed by the following partners:

Cheque Nos	Endorsed by
201443	Kueh Nai Hin and Jamil bin Razali
201448	Kueh Nai Hin and Jamil bin Razali
203370	Kueh Nai Hin
204418	Jamil bin Razali
327745	Kueh Nai Hin
328463	Kueh Nai Hin and Jamil bin Razali
328951	Kueh Nai Hin
330253	Kueh Nai Hin
330254	Kueh Nai Hin

A THE UNDISPUTED FACTS

Apart from the agreed facts, the following relevant facts as adduced from the evidence are also not disputed, namely:

(i) that the managing partner of the plaintiff was Kueh Nai Hin (Kueh);

B

(ii) that there were times when the plaintiff required money urgently to pay its drivers and labourers;

(iii) that the collection and banking of cheques of the plaintiff were mainly done by Kueh;

C (iv) that it was Kueh who presented the nine cheques to the defendant for credit into Usahasama Enterprises' account with the defendant;

(v) that all the nine cheques were crossed and marked with the words 'Not negotiable';

(vi) that six of the cheques, namely, cheques Nos 330253, 330254,

D 327745, 328951, 201443 and 328563 had the words 'or bearer' undeleted while the remaining three, namely, cheques Nos 203370, 204418 and 201448 had the words 'or bearer' deleted; and

(vii) that the plaintiff had obtained judgment against Kueh in respect of the nine cheques.

E

THE ISSUES AND FINDINGS

From the agreed and undisputed facts, the evidence adduced and the submissions of the learned counsel for the parties I am of the view that in coming to a decision on this case the following issues need to be

F addressed, namely:

(a) whether on the facts and in law the defendant was negligent in doing what it did;

(b) if so, whether the plaintiff contributed to the negligence;

(c) alternatively, on the facts and in law whether the defendant can be

G held liable for conversion or for money had and received for what it did.

Issue (a): Whether on the facts and in law the defendant was negligent in doing what it did

H Apart from the agreed facts and the undisputed facts it is also relevant to consider the testimonies of the witnesses called by the respective parties when considering this issue.

In his evidence, PW1, Jamil Hj Razali, who was also one of the partners of the plaintiff, stated that he endorsed the relevant cheques

I without any intention of affecting the crossings thereof and that it was a normal practice that cheques received from Bank Negara were endorsed. He further testified that if the plaintiff required money urgently it would draw out from its account with Bank Utama. And he confirmed

that the plaintiff had also secured an overdraft of RM50,000 from Bank Utama. But I noted that the offer was only made on 12 April 1986. A

PW1 denied endorsing the relevant cheques at the premises of the defendant. And it was also not admitted while under cross-examination that the nine cheques were paid into Usahasama Enterprises' account in order to get immediate clearance since those cheques were in-house cheques of the defendant. B

For the defence, DW1, Ngu Tuong Ming, testified that the first eight cheques (exh A-3 to 11) came under his charge. It was his evidence that Kueh came to see him with the first cheque (No MBB 201443) and explained that though the cheque was for the plaintiff immediate clearance was necessary. As such the cheque had to be credited into Usahasama Enterprises' account. He admitted the cheque was crossed with the words 'not negotiable'. For that reason he said that he required the cheque to be endorsed by Kueh and another partner in the plaintiff. According to DW1 the cheque was therefore endorsed by Kueh and Jamil Hj Razali (PW1) and that the plaintiff's rubber stamp mark was also affixed. DW1 said that PW1 was with Kueh while the latter was explaining to him on the cheque. And the explanation as related by DW1 was that the plaintiff needed the money immediately to pay off the lorry drivers and sub-contractors involved in the transportation of rice from the Kuching Port Authority Wharf to the Lembaga Padi dan Beras Negara's store. C D E

In respect of Kueh DW1 said that he had been the customer of the defendant since 1974. And between 1985 and 1986 he was a good customer maintaining a well-conducted account and with integrity not in doubt. DW1 also explained that if the first cheque was not endorsed he would not have accepted it to be credited into Usahasama Enterprises' account. And as for the other cheques, though endorsed by either Kueh or Jamil (PW1), DW1 said that he accepted them since he had already accepted the first one. F

Under cross-examination DW1 replied to a question posed that the explanation to him was done by Kueh. As regards the endorsement on the first cheque DW1 said that two signatures of active partners were sufficient endorsement on the cheque and that it was his own initiative that he caused it to be endorsed by the two partners. On the acceptance of the cheque DW1 said that it was within his discretion and in this case he was satisfied with Kueh's explanation. When asked if he sought any explanation from the other partners DW1 replied that he did not since the two partners had already explained to him and that he was told by that two partners that the other two were only 'sleeping' partners. G H

When asked in re-examination DW1 said that Jamil (PW1) did not object to the explanation of Kueh. I

The next witness called for the defendant was DW2, Romeo Ling Pik Sing. In his evidence he said that he knew Kueh since he was a regular and a good customer of the defendant. When shown Ex A-12

A DW2 agreed that he accepted the cheque to be credited into Usahasama Enterprises' account with the defendant. He did so as he was shown by Kueh the business extract of the plaintiff and was also told by him that the cheque had been endorsed by the partners. According to DW2 if he did not know Kueh well enough he would not have accepted the cheque. And at that time he said that Kueh came alone.

B

In answer to the questions by the learned counsel for the plaintiff, DW2 said that Kueh came to see him as he was sitting on DW1's table. When Kueh asked him to accept the cheque he was shown the business extract. He also checked the endorsement on the cheque. When asked about the banking practice, DW2 said that in banking practice so long

C as a cheque has been endorsed that would be good enough. However, DW2 also added that the relationship between a customer and the bank should be vital.

Having considered the evidence in addition to the agreed and undisputed facts it is my finding that on the balance of probabilities I

D am inclined to believe the testimony of DW1 that PW1 was present when the first cheque was presented to him by Kueh. I say so because the signature of PW1 is not in dispute and in fact PW1 did not even say when and where he endorsed that cheque. All he could say was that it was the practice of the plaintiff that Bank Negara's cheques were endorsed by them. But in this case it was not a Bank Negara's cheque.

E It was contended that DW1 did not even asked for the identification of the person who came with Kueh on the day. But would that be necessary if both signatures were put down in front of him? Both signatures are not disputed in this case. I noted that PW1 only disagreed that he was at the premises of the defendant when he endorsed that first cheque.

F But he offered nothing more. And surprisingly under cross-examination he went on to deny endorsing the cheque as shown on Ex A (9-12) when such was an agreed fact and agreed by him as well in his examination-in-chief. I also find that PW1 was only interested in saying that as the defendant allowed the cheques to be credited into a different account it should be liable to repay the sums to the plaintiff regardless

G of the circumstances thereof.

Moreover, PW1 did not give or offer his version of the surrounding circumstances that existed at the material times. For instance, nothing was said by him as to why there was no query at all by him during the period between the banking in of the first cheque on the 27/9/85 and

H the last cheque on 27 December 1986, a period of over a year. Surely it would have been in his interest to find out since he claimed that payments to the workers came from the account of the plaintiff with Bank Utama. It is also interesting to note that in the bank statement of the plaintiff, exh D1, the amount in it was only RM515.35 as at 21

I August 1985. And as a partner in the plaintiff PW1 would have been interested to know its financial standing. Did he care whether or not the plaintiff was able to meet its financial obligations? Where did the money come from to pay the drivers and sub-contractors during that period? PW1 appeared to ignore this point. And this only leads me to

conclude that on the balance of probabilities DW1's evidence pertaining to the explanation of Kueh is not unreasonable or far-fetched. In fact PW1 did not even say anything as to why his suspicion on the management of the plaintiff was not triggered off by any event. Neither did he say whether or not he took out any drawings from the plaintiff for that period of over one year.

And it is also pertinent to note the following:

(i) the signatures are not in dispute;

(ii) that it is my finding that PW1 was present when the first cheque was presented to the defendant;

(iii) that there was no evidence of any query whatsoever for over one year from PW1 or any of the partners in the plaintiff on the movement of the cheques received by the plaintiff;

(iv) that it was not challenged that Kueh was a good customer of the defendant at the material time;

(v) that it is not in dispute that Kueh was the managing partner of the plaintiff and duly authorised to collect and bank in the plaintiff's cheques;

(vi) that due explanations were given by Kueh to DW1 and DW2 respectively and that they were satisfied;

(vii) that after the first cheque was credited into Usahasama Enterprises' account with the defendant and with PW1 having endorsed on that cheque, a precedent was created in so far as the defendant was concerned; and

(viii) that it is also my finding on the balance of probabilities that no protest came from PW1 on the explanation of Kueh when the first cheque was presented.

Now, it is also essential to consider the status of those cheques at the time of their acceptance by the defendant before a definite determination can be made on this first issue.

Learned counsel for the plaintiff conceded in his submission that a general crossing on a cheque with the words 'not negotiable' and with or without the word 'Bearer' deleted, does not prevent the transferability of that cheque. The case of *Algemene Bank Nederland NV v Happy Valley Restaurant Pte Ltd* [1991] 2 MLJ 289 was cited. Unfortunately, learned counsel did not assist on the issue pertaining to the effect of endorsements on cheques. He only contended that the defendant should have been put into inquiry since not all the partners of the plaintiff had endorsed on the cheques and he cited *Halsburys' Laws of England* (4th Ed) para 112 at p 86. But that passage dealt with the incidence of a banker being put into inquiry and not on the effect of an endorsement on a cheque. And even assuming that that passage is applicable to the facts in the instant case, no assistance can be derived in favour of the plaintiff. There was no rebuttal to the evidence of DW1 that Kueh had explained as to why the first cheque, though payable to the plaintiff,

was necessary to be credited into Usahasama Enterprises' account with the defendant. And over a year there was no query from any of the partners in the plaintiff in any of the dealings of the nine cheques. Thus, on that piece of evidence it cannot be said that the defendant should have known that Kueh was using the cheques for his own benefit and that it should have been put into inquiry. In any event, DW1 and DW2 did take sufficient precautions, in my view, by considering first the explanation of Kueh and ensuring that those cheques were duly endorsed by the plaintiff through one or two of the partners. Furthermore, there was no dispute that Kueh was the managing partner of the plaintiff and thus the defendant was dealing with the proper person from the plaintiff.

It cannot also be denied that in law the nine cheques are crossed generally as prescribed under s 76 of the Act since what appeared on them were the words '& Co' in between two parallel lines and also the words 'not negotiable'. And as to the effect of the words 'not negotiable' s 81 of the Act provides:

> Where a person takes a crossed cheque which bears on it the words 'not negotiable' he shall not have and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had.

Thus, transferability is not in doubt.

Next, the effect of the deletion or the non-deletion of the words 'or bearer' on the cheques and the endorsements thereof require consideration. Where a cheque, though to a specified payee, has also the words 'or bearer' on it undeleted it is a 'bearer cheque.' (See s 8(3) of the Act.) And since six of the cheques in this case, namely, cheques Nos 330253, 330254, 327745, 328951, 201443 and 328463 (exh A-3, 4, 5, 8, 10, and 11) had the words 'or bearer' undeleted there were therefore in fact 'bearer cheques.' And under s 31(2) of the Act a bill payable to a 'bearer' is negotiated by delivery. Thus, the six cheques, being 'bearer cheques', could therefore be negotiated by delivery. As such, on presentation of the six cheques in this case by the bearer, Usahasama Enterprise, the defendant had to accept them for payments. And the word 'bearer' is defined in s 2 of the Act as 'the person in possession of a bill or note which is payable to bearer'.

Accordingly, I agree with the submission of the learned counsel for the defendant that in the circumstances the defendant had done nothing wrong in law by crediting the sums payable under the six cheques to Usahasama Enterprises' Account. As to the argument that though the cheques were 'bearer cheques' the fact that the payee was not Usahasama Enterprise should have put the defendant into inquiry, I have already dealt with it earlier on.

In respect of the remaining three cheques, namely, cheques Nos 203370, 204418 and 201448 (exh A (6, 9 and 12)) which had the words 'or bearer' deleted they were cheques or bills payable to order. (See s 7(1) of the Act.) However, a cheque payable to order can be altered into a 'bearer cheque' if it is endorsed in blank, that is, a

signature thereof specifying no endorsee. Section 34(1) of the Act reads:

> An indorsement in blank specifies no indorsee, and a bill so indorsed becomes payable to bearer.

In the present case there is no dispute that the three cheques were endorsed by Kueh, Jamil Hj Razali and both of them respectively with the stamp of the plaintiff duly affixed as well. And these two persons were partners in the plaintiff. No endorsee was specified. Thus, being the payee of the cheques, the plaintiff had accordingly endorsed them in blank thereby converting the three cheques into 'bearer cheques' and could therefore be duly negotiated by delivery. Thus, the three cheques came under the same category as the six cheques. Accordingly, I also agree with the submission of the learned counsel for the defendant that on the three cheques the defendant should not be faulted.

No doubt it could be argued that even in a 'bearer cheque' situation a banker should also be put on inquiry if the payee is not the same as the account-holder into which it is intended to be credited. However, in the instant case the facts justified, in my view, the conclusion that sufficient inquiry was done by the defendant before accepting the cheques, in particular, the first cheque. Though the subsequent cheques were accepted without further inquiry as was done for the first one, the endorsements on those cheques and the absence of any query from the plaintiff over a period of over one year supported the conclusion that a precedent had already been established in so far as the defendant was concerned.

Section 85 of the Act was also pleaded by the defendant in its defence. Section 85 reads:

> Protection of bankers collecting payment of cheques, or certain other instruments.
>
> (1) Where a banker, in good faith and without negligence —
>
> (a) receives payment for a customer of an instrument to which this section applies; or
>
> (b) having credited a customer's account with the amount of such an instrument, receives payment thereof for himself;
>
> and the customer has no title, or a defective title, to the instrument, the banker does not incur any liability to the true owner of the instrument by reason only of having received payment thereof.
>
> (2) This section applies to the following instruments, namely —
>
> (a) cheques;
>
> (b) any document issued by a customer of a banker which, though not a bill of exchange, is intended to enable a person to obtain payment from that banker of the sum mentioned in the document;
>
> (c) any draft payable on demand drawn by a banker upon himself, whether payable at the head office or some other office of his bank.

(3) A banker is not to be treated for the purposes of this section as having been negligent by reason only of his failure to concern himself with absence of, or irregularity in, indorsement of an instrument.

In view of what I have said earlier on in this judgment, it is my conclusion that s 85 therefore applies in the instant case.

And on the facts and circumstances of this case I also find that on the balance of probabilities the defendant acted in good faith, honestly and without any negligence on its part when those cheques were accepted and credited into the account of Usahasama Enterprise. Thus, my conclusion to this first issue is therefore in the negative.

Issue (b)

In view of my conclusion on issue (a) there is therefore no necessity to deal with this issue (b), ie on contributory negligence of the plaintiff.

Issue (c): Alternatively, on the facts and in law, whether the defendant can be held liable for conversion or for money had and received for what it did

Learned counsel for the plaintiff submitted that this court (and I quote) 'has to consider whether the defendant had authority from the plaintiff and if the plaintiff had given the defendant authority, than (sic) the plaintiff's claim for conversion would fail'. And the judgment of Gunn Chit Tuan J (as he then was) in the case of *Woodland Development Sdn Bhd v Chartered Bank* [1986] 1 MLJ 84 was extensively quoted. The facts of that case were that the plaintiff received three cheques with the first cheque being crossed generally while the last two had the words 'Account Payee'. These three cheques were given by one of the directors of the plaintiff to the other two directors of the plaintiff to be used to open an account with the defendant. At that time all the three directors of the plaintiff were also the directors of a company called PJTV & Densun (M) Sdn Bhd (the third party) which had an account with the defendant. The two directors instead of opening an account for the plaintiff, persuaded the manager of the defendant to credit those cheques into the account of the third party which had a temporary overdraft with the defendant. The plaintiff therefore sued the defendant and the third party for conversion and alternatively for money had and received to their use. The trial judge found for the plaintiff.

Relying on the above case learned counsel for the plaintiff in the present case submitted that the defendant should not have assumed that Kueh had the apparent authority to bind the plaintiff without making further enquiries and that Kueh did not have the authority, actual or apparent, to have those cheques presented and credited into Usahasama Enterprises' account.

However, there are several distinguishing factors between *Woodland*'s case and the present one. To begin with, the status of the respective plaintiffs are not the same. In that case the plaintiff was an incorporated body thus having its own entity whereas in the instant case the plaintiff is only a partnership.

Further, in that case two of the cheques were marked 'Account Payee' whilst the third was a 'bearer cheque'. But even on the 'bearer cheque' there was no evidence of inquiry done by the defendant except to give in to the persuasion of the two directors and that the cheques were accepted as a favour to the directors.

Whereas, in the present case none of the nine cheques were marked 'Account Payee'. And although six were obviously 'bearer cheques' while the three were endorsed in blank thereby making them 'bearer cheques' as well, the defendant by its officer, DW1, went on to hear the explanation of Kueh regarding the need for the first cheque to be credited into Usahasama Enterprises' account. Moreover, all the cheques were endorsed by the plaintiff with its stamp mark affixed. Here lies therefore another distinction between that case and the present one. And while on this issue of endorsement, I do not think it is necessary in a partnership that all the partners must endorse any cheque payable to the partnership. Section 32(c) of the Act excluded that requirement. Of course, it would also depend on the arrangement amongst the partners. But in the present case PW1 did not indicate in his evidence that all partners must endorse. In fact he would not have been able to say so as he did endorse singularly on one cheque.

As for the authority of the directors in the *Woodland*'s case there was none since such an authority would have been in the form of a resolution of the plaintiff's board of directors. But in the case at hand the defendant was dealing with the managing partner of the plaintiff, Kueh. And as earlier concluded, PW1, another partner in the plaintiff was also present when the first cheque was presented to the defendant. Thus, it would be reasonable for the defendant to conclude that the two partners had the authority. PW1 in his evidence testified that he did not authorise Kueh to credit the cheques into Usahasama Enterprises' account. However, I do not think PW1 was in the position to authorise as his share in the partnership was only 30%. In view of my finding of the presence of PW1 during the presentation to the defendant of the first cheque and that there was no protest from him, the two of them, namely, PW1 and Kueh, who was also having 30% share, would have duly authorised the defendant to act on the first cheques as it did. And having accepted the first cheque it would only be logical that the defendant should give the same treatment to the subsequent cheques in the absence of any objection from the other partners in the plaintiff. Thus, on the facts of the present case there was no doubt in my view as to the authority of those whom the defendant dealt with and the authorisation given to the defendant, apparent or otherwise, that followed. For the foregoing reason the claim of the plaintiff for conversion should therefore fail.

It is also of interest to note that in *Woodland*'s case the reason for crediting the cheques into the third party's account was proven to be false whereas in the instant case it was not the evidence of PW1 that the explanation of Kueh as related by DW1 was not true. In fact it was not shown that there was no truth in the claim that the money was required

urgently to pay the drivers and sub-contractors. This point only leads to a conclusion that it was more probable than not that the explanation of Kueh to DW1 pertaining to the urgent need of money by the plaintiff must be true.

As for the other basis of claim, ie for money had and received, it was submitted by the learned counsel for the plaintiff that since the defendant failed to show that it was protected by s 85 of the Act it should therefore be liable. In view of my earlier finding and on the applicability of s 85 I do not think there is any merit to that submission. Accordingly, the claim on such a basis must also fail.

CONCLUSION

The action of the plaintiff is therefore dismissed with costs for the reasons stated hereinabove.

Action dismissed.

Reported by Raymond Tsui Wai Nam